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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, ET AL.,
Appellants,

v.

HARRISON SCHMITT, ET AL.,
Appellees.

and

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellants,

v.

AMERICANS FOR CHANGE, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE DISTRICT COURT CORRECTLY HELD UNCONSTITUTIONAL SECTION 9012(f) OF THE FUND ACT	4
A. Section 9012(f) Denies to Individuals and Independent Political Committees Meaningful First Amendment Rights in Presidential Campaigns	4
B. Section 9012(f) Cannot be Justified by a Governmental Interest in Eliminating Corruption	8
II. A REMAND FOR FURTHER FACTUAL DEVELOPMENT IS UNNECESSARY FOR RESOLUTION OF THE CONSTITUTIONAL ISSUE	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES:

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934) 11

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Polk v. Glover, 305 U.S. 5 (1938) 11

Republican National Committee v. Federal Election Commission, 487 F.Supp. 280 (S.D. N.Y.) *aff'd mem.* 445 U.S. 955 (1980) 8

United States v. Automobile Workers, 352 U.S. 567 (1957) 11

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment ..... *passim*

STATUTES:

Former 18 U.S.C. § 608(e)(1) 7

26 U.S.C. § 9012(f) ..... *passim*

26 U.S.C. § 9012(f)(1) 4

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BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Southeastern Legal Foundation is a non-profit corporation organized in 1976 for the purpose of advancing the consideration of public interest viewpoints in adversarial proceedings involving significant issues. In particular, Southeastern has been active in many forums urging greater respect for individual rights and liberties. This Court has permitted Southeastern

to file amicus curiae briefs in several cases during its past three terms and Southeastern has submitted such briefs to a number of United States Courts of Appeals and District Courts.

Southeastern participated as amicus curiae in the instant cases before the District Court and now wishes to continue that participation before this Court.[1] The parties in both cases have consented to the filing of this brief. Copies of their consent letters have been filed with the Clerk of the Court.

A large number of individuals contributed to the activities of various independent political committees during the 1980 presidential election. Among these individuals are some of Southeastern's trustees, officers and contributors. They have a direct interest in the status of Section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act"),[2] and have a continuing interest in the preservation of their First Amendment right to engage in political activities through the mechanism of independent committees.

The scope of political activities protected by the First Amendment can be sharpened and defined by a consideration of the constitutionality of Section 9012(f). The rights of all individuals interested in supporting and utilizing independent political committees, outside the control of candidate-authorized or official party committees, are at stake and would be adversely affected by a reversal of the decision below. For these

[1] Due to the common issues of the two cases before the Court, Southeastern addresses both cases with one brief.

[2] 26 U.S.C. § 9012(f).

reasons, Southeastern submits this brief to urge this Court to note probable jurisdiction and to affirm.

SUMMARY OF ARGUMENT

Section 9012(f) of the Fund Act limits political activities which are independent of control and coordination by presidential candidates or political parties. That limitation unconstitutionally burdens the First Amendment right of individuals to exercise freedom of speech and freedom of association.

No compelling governmental interest can justify the broad sweep of Section 9012(f)'s encroachment upon those rights. Consistent with this Court's past decisions, this Court can and should affirm the opinion below striking down Section 9012(f).

Common Cause,[3] while ostensibly seeking an ultimate adjudication as to the constitutionality of Section 9012(f), asks this Court to reverse and to remand to the District Court for further factual discovery. The issue of constitutionality, however, can and should be decided without the unnecessary delay of a remand.

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[3] This brief refers to the appellants in Common Cause v. Harrison Schmitt, Case No. 80-847, as "Common Cause," and to the Federal Election Commission, appellant in Federal Election Commission v. Americans for Change, Case No. 80-1067, as "FEC." Appellees common to both cases are referred to as such and where appropriate, Common Cause and FEC are described as appellants.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD UNCONSTITUTIONAL SECTION 9012(f) OF THE FUND ACT

In a well-reasoned opinion, the District Court correctly held that Section 9012(f) of the Fund Act violates the First Amendment. That decision represents an appropriate application of this Court's opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*"Buckley"*), and should be affirmed.

A. Section 9012(f) Denies to Individuals and Independent Political Committees Meaningful First Amendment Rights in Presidential Campaigns.

The scope of Section 9012(f) is broad.[4] It covers the activities of the appellee independent political committees and also has a significant impact on the individuals associated with those committees. Despite appellants' efforts to show otherwise, Section 9012(f) imposes a significant burden on free expression and association.

The $1,000 limit of Section 9012(f) prevents independent political committees from engaging in mean-

[4] Section 9012(f)(1) states, in relevant part, that

> . . . it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate, in an aggregate amount exceeding $1,000.

ingful free speech through the print and electronic media. In presidential elections, which today are so influenced by mass media presentations, $1,000 does not go very far. In terms of buying power, the $1,000 limitation is nearly as effective as a complete prohibition on any expenditure.

To soften the impact of Section 9012(f)'s limitation, appellants assert that Section 9012(f) leaves an individual free to spend unlimited amounts of his own money to further the election of a publicly-financed candidate. Common Cause's Jurisdictional Statement at 24; FEC's Jurisdictional Statement at 17. While this may be true, that "freedom" has little significance for most individuals, for only very wealthy individuals could enjoy that "freedom." The cost of mass electronic and print media takes the individual option away from most persons unless they are permitted to associate in a practical and meaningful manner.

Appellants also assert that individuals may associate informally, without an organized committee, to pool their own money and spend it, without limit, on behalf of a presidential candidate. Common Cause's Jurisdictional Statement at 24; FEC's Jurisdictional Statement at 19.[5] This approach also suffers from bias towards

[5] In their effort to justify Section 9012(f)'s restriction on free speech, by emphasizing the freedom left to individuals to spend unlimited amounts, appellants seem to counter another of their arguments, that the Fund Act's scheme was aimed at eliminating "big money" and the influence it can buy. It is incongruous to leave wealthy individuals unlimited freedom to spend and yet to limit other individuals, who must use political committees to gain meaningful speech, through the $1,000 restriction of Section 9012(f).

wealthy individuals and ignores the practical realities of informal organizations. Although it might be feasible for five millionaires to go together to a television station and buy $500,000 worth of advertising with cash out of their own pockets, 5,000 persons able to put up only $100 each could not achieve the same purchasing feat without some form of organization involving delegated authority.

If appellants' arguments regarding individual and informal group freedoms are considered in the light of the real world, they are not persuasive. Their view opposes the position taken by this Court in *Buckley, supra* at 49, that "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." The Constitution does not permit Congress to "restrict the speech of some elements in our society in order to enhance the relative voice of others." *Id.* at 48-49.

In addition to the individual/informal group alternatives already discussed, the FEC points out that Section 9012(f) does not prevent individuals from volunteering their services to candidates and political parties or from making certain contributions. FEC's Jurisdictional Statement at 17-18. However, these alternatives preclude the meaningful impact that the electronic and print media can attain and are slanted towards the political party structures. Those individuals who do not wish to be affiliated with the existing political parties or authorized committees cannot avail themselves of the FEC's suggestions.

This Court held in *Buckley, supra* at 39, that a re-

striction upon the expenditures of individuals and groups "limit[s] political expression 'at the core of our electoral process and of the First Amendment freedoms.' " This Court invalidated a provision of the Federal Election Campaign Act[6] which limited independent expenditures to $1,000 "relative to a clearly identified candidate" in federal campaigns, saying that it "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley, supra* at 22. In this context, this Court stated that the "constraints on the ability of independent associations . . . to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents,' *Sweezy v. New Hampshire*, 354 U.S. 234, 250 . . . (1957) (plurality opinion)." *Buckley, supra* at 22.

Without the option of unrestricted independent expenditures, many individuals and groups would be denied the opportunity to "effectively amplify" their political views in presidential campaigns. Rather than viewing the recent increase in independent political committee activity as a dangerous development, as ap-

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[6] The section in question, former 18 U.S.C. § 608(e)(1), provided that:

> No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (e)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

pellants do, it should instead be accepted as a new and valuable means of First Amendment expression.

In last year's decision in *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280, 286 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980), the District Court ruled that among the "wide range of ways" supporters of presidential candidates may express themselves is the important mechanism of making expenditures without coordination from a candidate. This ruling was based on this Court's earlier view in *Buckley* that limitations on uncoordinated expenditures are unconstitutional.

Nothing has happened since 1976 to warrant a reversal in approach to limitations on independent expenditures. In their pursuit of meaningful free speech, both individuals and the independent political committees they support financially should be protected from the burdensome restriction of Section 9012(f).

B. Section 9012(f) Cannot be Justified by a Governmental Interest in Eliminating Corruption.

Appellants contend that Section 9012(f) is constitutional because it furthers a governmental interest in eliminating corruption. While such a goal may be a legitimate governmental interest, it must be carefully restricted when it conflicts with fundamental First Amendment liberties.

To establish a case for preserving Section 9012(f), Common Cause and FEC have suggested that dangers of corruption are inherent in the present and future operations of independent political committees such

as those of the appellees in this case. Common Cause's Jurisdictional Statement at 27-28; FEC's Jurisdictional Statement at 26-29. This theory assumes that the activities of all independent political committees should be restricted, whether or not their activities even remotely touch upon the possibility of corruption. The defect of this theory and likewise the defect of Section 9012(f) is that they reach too far. They apply to *all* expenditures in excess of $1,000 furthering the election of presidential candidates by *all* independent political committees and thereby catch in their net both the good and the bad fish.

Congressional regulation and control of corruption in the election context should be designed to reach only possible corruption without unnecessarily restricting the First Amendment rights of many people and groups.[7] The overly broad reach of Section 9012(f) is not justified by a compelling governmental interest.[8] Without a substantial governmental interest to counterbalance the drastic restrictions Section 9012(f) places upon the exercise of free speech and free association by independent political committees and the

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[7] Indeed, it may be that Section 9012(f) is unnecessary because Congress already has acted to control contributions to publicly funded presidential candidates, and this Court has held that expenditures which are actually coordinated with or controlled by a candidate constitute contributions. Buckley v. Valeo, 424 U.S. 1, 46 (1980). Such sham expenditures are subject to FEC enforcement power. Opinion of District Court below, Common Cause's Jurisdictional Statement at 13a, 25a.

[8] In *Buckley, supra* note 7, at 47-48, this Court ruled than an independent expenditure limitation "fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."

individuals who support them, Section 9012(f) is unconstitutional.

II. A REMAND FOR FURTHER FACTUAL DEVELOPMENT IS UNNECESSARY FOR RESOLUTION OF THE CONSTITUTIONAL ISSUE

Although Common Cause and the FEC agree that the ultimate question before this Court is the constitutionality of Section 9012(f) of the Fund Act, Common Cause asks this Court to delay resolution of that issue while the factual record is expanded in the District Court. Such a delay is unnecessary and could chill the exercise of political free speech until the constitutional issue is again before this Court. Southeastern agrees with the FEC that it is appropriate for this Court to note probable jurisdiction and to decide the case on the present record.

Common Cause's request is inappropriate because it relates only to facts (1) which are not in controversy in this appeal and (2) that are not essential to the adjudication of the constitutionality of 9012(f). Common Cause has asserted that there is no danger from the "small voices" of the individuals who support independent political committees, Common Cause's Jurisdictional Statement at 28. Therefore, the request for discovery into the relationship between the "small voices" and the "political pros" in the committees, *id.* at 14 n. 16, could have no relevance to the danger of corruption feared by Common Cause.

Common Cause has conceded the independence of appellee committees, *id.* at 6 n. 7, and it is thus sufficient that Section 9012(f) is broad enough to include

in its sweep the activities of the appellee committees. Facts that are essential to the adjudication of the validity of Section 9012(f) are in the record.[9]

[9] While, as Common Cause correctly notes, this Court requires a concrete factual setting with an adequate record to sharpen "the deliberative process especially demanded for constitutional decisions," United States v. Automobile Workers, 352 U.S. 567, 591 (1957), this requirement relates to "essential facts." Polk v. Glover, 305 U.S. 5, 10 (1938); Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 213 (1934). Common Cause's reliance on *Automobile Workers, supra*, in its call for further factual development is misplaced because, in contrast to the situation in this appeal, the District Court in that case had not addressed the constitutional issue. Southeastern believes that the constitutional issue presented to this Court by this appeal would not disappear if a remand occurred, and would ultimately return to be decided by this Court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of the appeals filed by Common Cause and FEC and should affirm the opinion of the District Court below.

Respectfully submitted,

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